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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL OSEGUEDA,

Defendant and Appellant.

B213246

(Los Angeles County
Super. Ct. No. BA 230279)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Rand S. Rubin, Judge. Affirmed.

Mark D. Lenenberg, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James
William Bilderback II and Sonya Roth, Deputy Attorneys General, for Plaintiff and
Respondent.

Defendant Samuel Osegueda timely appealed from his conviction for first degree murder, attempted murder, attempted premeditated murder, and conspiracy to commit murder. The jury found true various enhancements, and the court sentenced defendant to 100 years to life plus 9 years in state prison. Defendant formed a conspiracy to murder a member of a rival gang member, and in the course of that conspiracy, defendant shot and killed a young boy. Defendant contends that he was deprived of his constitutional right to due process when the prosecution's expert witness testified on the defendant's subjective intent and expectations and that the conspiracy to commit murder count should be reversed because there was insufficient evidence of an agreement to commit murder. We affirm.

FACTURAL BACKGROUND

I. Prosecution Case

Trinity Park is the backdrop in which the fierce rivalry between the Primera Flats gang and the Ghetto Boys gang is often acted out. Trinity Park is bordered by 23rd and 25th Streets and Wall and Trinity Streets. This location is significant because the park is situated in between each gang's territory, prompting a "turf war" for control of the park. Graffiti, analogous to a proclamation of ownership, litters various areas of the park. Sometimes one gang's graffiti is "crossed out" in a sign of disrespect. Such acts of disrespect intensify the ongoing rivalry.

In the late afternoon of April 11, 2002, Bobby and Paul Martinez were sitting on a bench in Trinity Park, hanging out with Bobby's girlfriend, Jennie Olvera and her three-year-old son, when they were approached by a group of Hispanic males, including appellant, Samuel Osegada aka Smiley. Bobby recognized appellant and his friends as members of the Primera Flats gang. Bobby was concerned because his brother, Paul, was a member of the Ghetto Boys gang. Appellant asked the group, "Is there any Gummy Bears right here in this park because we're not going to have them in this park," Paul

felt the reference to Gummy Bears was disrespectful because appellant knew Paul was a member of the Ghetto Boys. Paul also believed appellant had a gun in his pocket.

Sensing a possible violent confrontation, Bobby told his brother not to say anything. Bobby stood up in front of Paul and told appellant, “‘Nobody is from nowhere.’” Appellant and his friends then left.

Later that evening, Paul was playing basketball in the Trinity Park gym when two hooded men entered the gym. Paul recognized these two men as appellant and a man named Jose Romano aka Dreamer. Paul’s attention was immediately drawn to Romano, who carried a shotgun. In an effort to escape, Paul ran outside through an opposing set of doors. Shots rang out as Paul fled the gym, running towards the shelter of his aunt’s house. Paul recognized the gun shots as a shotgun and a nine-millimeter.

While Paul was playing basketball in the gym, Mario Martinez, brother of Paul and Bobby, joined Bobby, Olvera and her child, on a bench outside the gym. Mario was also a member of the Ghetto Boys. Suddenly, Paul ran from the gym, yelling at Mario to “‘watch out.’” Mario then saw the two shooters emerge from the gym. Mario got a clear view of appellant as he came out the door. Upon hearing Paul’s warning, appellant pointed his gun at Mario, who ran in the same direction as Paul. Appellant fired approximately four to seven shots at Mario as Mario ran away.

As appellant was firing at Mario, Olvera was frantically looking for her child. She spied him underneath appellant’s gun. Alarmed, Olvera pushed appellant causing his hood to fall off, revealing his identity to Olvera. Appellant then turned and ran.

Meanwhile, Paul was running from Romano. As Paul ran, he crossed paths with Anthony Ramirez, an eight-year-old boy playing a game in the park with his cousin, Jorge Farias. Both Romano and appellant shot in the direction of the children. Anthony Ramirez was caught in the cross fire and died of a gunshot wound to the chest. No bullet was ever recovered and the autopsy could not determine the type of weapon used to kill Ramirez. A nine-millimeter casing and a shotgun shell were found at the crime scene.

II. Defense Case

Testimony was introduced of a conversation between Olvera and her sister, Christina Gonzales that occurred after the shooting on April 11, 2002. Olvera told her sister that appellant was not present during the shooting and that Olvera had lied to police because her boyfriend, Bobby, had threatened to hurt her. Olvera was also fearful of the police, who had threatened to take away her kids and put her in jail if Olvera did not testify. It was these reasons that motivated Olvera to testify, not because she saw appellant commit the crime.

DISCUSSION

I. Expert Opinion Testimony

Both parties agree to the use of expert testimony to meet the requirements of Penal Code section¹ 186.22, subdivision (b)(1), which provides sentence enhancement to “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” Appellant’s primary point of contention lies in a specific exchange between the prosecution and their expert witness. During this exchange, the expert was given a hypothetical scenario mirroring the facts of the case at bar and asked if the hypothetical crime was committed for the benefit of the gang. The expert opined that the crime was done for the benefit of the gang based on the fact that the crime served to promote the gang. Appellant argues that the use of this hypothetical exceeded the limitations of expert testimony. He contends that the testimony impermissibly contained the expert’s thoughts on the subjective expectations and knowledge of the gang members as individuals, the intent of the gang as a whole, as

¹ Unless otherwise noted, all statutory references are to the Penal Code.

well as the gang's interpersonal connections, essentially telling the jury how to decide the ultimate issue. Alternatively, appellant argues that the highly prejudicial nature of the gang evidence makes it inadmissible. We disagree.

A. Background

At trial, the prosecution called Officer Gerald Ballesteros, a gang expert, to testify on his familiarity with the Primera Flats and Ghetto Boys. While testifying, the prosecution posed a hypothetical to Ballesteros to which the following exchange occurred:

[Prosecution]: Let me give you the following hypothetical. Late afternoon, three - well, let's say several male Hispanics, at least one from Primera Flats criminal street gang, come to Trinity Park. [¶] One of them states to a Ghetto Boys gang member, "Are" -- or in the direction of the Ghetto Boys gang member, "There better not be any Gummy Bears here in the Park." [¶] And then some hours later this gang member and other gang members from Primera Flats come back to the park with guns, begin chasing a Ghetto Boys gang member, firing the weapons. [¶] Do you have an opinion as to whether this crime was committed for the benefit of, at the direction of, or in association with the criminal street gang Primera Flats?

....

[Ballesteros]: That it was done to benefit the members of the Primera Flats gang along with the gang itself.

[Prosecution]: And what is that opinion based upon?

[Ballesteros]: Based on you have members of Primera Flats initially telling a Ghetto Boys gang member that there better not be any Ghetto Boys in the park. [¶] They return later and proceed to attempt to shoot and kill this person they believe is a Ghetto Boys gang member. [¶] It benefits the gang by showing that they're willing to shoot and kill a rival gang member to bring up their status among the gangs in the area. [¶] It brings a respect among the persons that actually commit the crime, that do the shooting. They're brought to a higher level. They're looked up upon by other members of the gang. [¶] They do this in a large park where people are out there. It intimidates the people in the neighborhood by these gang members committing this crime at a large park, and it shows other gangs in the neighborhood that they're willing to commit this type of crime to enhance their gang.

[Prosecution]: Okay. And now, is it necessary to your opinion that all of the same people who were there in the late afternoon were the same people who were there later on in the early evening?

....

[Ballesteros]: No.

[Prosecution]: And why is that?

[Ballesteros]: Because they're still members of Primera Flats coming to put their work in. What I mean is they'll go and do a drive-by shooting, go and do a walk-up shooting, attempt to hurt or kill a rival gang member.

[Prosecution]: Officer -- and this is just going to be a yes or no question. This crime that you've opined was committed for the benefit of, at the direction of, or in association with the Primera Flats criminal street gang, do you have an opinion as to whether that was with the intent to further the criminal activity engaged in by that gang Primera Flats?

[Ballesteros]: Yes.

[Prosecution]: And a yes or no, what is your opinion?

[Ballesteros]: Yes, that it did.

B. Officer Ballesteros' opinion was within the permissible scope of expert testimony

Evidence Code section 801, subdivision (a), governs expert testimony, including limitations as to what an expert may testify to. It states, "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." The admissibility of testimony on the culture and habits of criminal street gangs is well established under Evidence Code section 801. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370-1371 ["The use of expert testimony in the area of gang sociology and psychology is well established" and "sufficiently beyond common experience to require interpretation by [an expert], thus bringing those matters within Evidence Code section 801's requirements."]; *People v. Gamez* (1991) 235 Cal.App.3d 957, 964-966 [Testimony of gang relationships, membership, and ongoing criminality of gangs were all matters beyond common knowledge and are therefore admissible under Evidence Code section 801.].) Moreover, such evidence is admissible even though it encompasses the ultimate issue of the case. (Evid. Code, § 805; *People v. Olguin, supra*, 31 Cal.App.4th at p. 1371.)

In *People v. Gardeley*, *supra*, 14 Cal.4th at page 618, the California Supreme Court ruled that testimony elicited from a gang expert in response to a hypothetical based on the facts of the crime was acceptable to establish an element of section 186.22. The gang expert testified in that case that the hypothetical posed described a “classic example” of gang-related activity that sought to frighten residents of the community and secure the gang’s drug-dealing stronghold. (*Id.*, at p. 619.) This testimony led the jury to conclude that the crime in question was committed for the benefit of the gang. (*Ibid.*) Similarly, the gang expert in *People v. Olguin*, *supra*, 31 Cal.App.4th at page 1371, was asked his opinion on a gang member’s expectations after gang members yelled out their gang affiliation. He replied, ““The gang member would expect a violent confrontation.”” (*Ibid.*) The *Olguin* court found that this “testimony focused on what gangs and gang members typically expect and not on [the defendant’s] subjective expectation in this instance”; therefore, the expert testimony was permissible. (*Ibid.*)

In this case, appellant relies almost exclusively upon *People v. Killebrew* (2002) 103 Cal.App.4th 644 to support his argument that Ballesteros’ testimony exceeded the permissible scope of expert testimony. The defendant in *Killebrew* was possibly a passenger in one of three cars, all carrying gang members allegedly involved in gang-related activities. (*Id.*, at pp. 647-649.) The court noted that expert testimony about the culture and habits of criminal street gang could include testimony about “whether and how a crime was committed to benefit or promote a gang.” (*Id.*, at pp. 656-657.) However, the expert had testified that each of the individuals in the three cars knew there was a gun in each of two of the cars and jointly possessed the gun with every other person in all three cars for their mutual protection. (*Id.*, at p. 658.)

On appeal, the defendant claimed that these opinions on the “subjective knowledge and intent of each occupant in the car were improperly admitted.” (*People v. Killebrew*, *supra*, 103 Cal.App.4th at p. 658.) The *Killebrew* court agreed. After review of relevant precedent, including *Gardeley* and *Olguin*, the court acknowledged that none of those cases “permitted testimony that a specific individual had specific knowledge or

possessed a specific intent.” (*Ibid.*) Thus, the testimony heard in *Killebrew* “went much farther” than testimony given in previous cases. (*Ibid.*) The court found that the expert’s testimony was inadmissible because it spoke to the defendant’s subjective knowledge and intent to possess a handgun and “[s]uch testimony is much different from the expectations of gang members in general when confronted with a specific action.” (Emphasis omitted.) (*Ibid.*)

Appellant argues that Ballesteros’ testimony was improperly used as evidence of his subjective knowledge and intent to commit murder as illustrated in *Killebrew*. We disagree because appellant mischaracterizes Ballesteros’ testimony. In response to a question that asked whether a hypothetical crime was committed for the benefit of the gang, Ballesteros opined that the crime benefited the gang because it improved their status among rival gang members and further, acted to intimidate those in the neighborhood. Ballesteros also opined that the crime was committed with an intent to further the criminal activities of the Primera Flats. As appellant states, the admissibility of the testimony depends on the “how” and “what” of that testimony. It is exactly for this reason that appellant’s argument must fail.

We conclude that these answers fall under the “culture and habits of criminal street gangs” standard approved in *People v. Gardeley, supra*, 14 Cal.4th at page 617 and fleshed out in cases such as *Killebrew*. Ballesteros did not opine about the subjective intent of appellant. Nor did Ballesteros opine about any specific knowledge or intent possessed by members of the Primera Flats as the expert did in *Killebrew*. Instead, Ballesteros opined as to the expectations and intent of a gang member generally. For instance, like the expert in *Gardeley*, Ballesteros explained that a retaliatory act such as the shooting of a rival gang member would benefit the gang because it intimidates the neighborhood and shows other gangs that they are willing to commit violent acts to enhance their status. This information assisted the trier of fact and established the elements of section 186.22. The testimony was not tantamount to expressing an opinion as to appellant’s guilt. (*People v. Ward* (2005) 36 Cal.4th 186, 210.)

Moreover, in *Killebrew*, the expert testimony was the only evidence offered by the prosecution to establish guilt on the conspiracy charge, essentially telling the jury how the expert felt the case should be decided. In this case, Ballesteros' testimony corroborated other evidence and provided the jury with a possible motive and intent for appellant's actions, an act many on the jury might not have understood without this testimony. Thus, the testimony, along with other evidence offered by the prosecution, assisted the jury to find appellant guilty. Accordingly, we conclude that the expert testimony was proper.

C. Expert testimony and gang allegations were not subject to a section 352 objection

Appellant also argues that the expert testimony should be excluded pursuant to Evidence Code section 352 due to its highly inflammatory and prejudicial nature. Similarly, he argues that admission of other evidence detailing gang allegations was prejudicial and clouded the resolution of the jurors. Appellant concedes that counsel did not make this objection at trial, but argues that the absence of the objection is evidence of the ineffective assistance of counsel. This court does not need to address that argument because assuming, *arguendo*, that appellant had made a section 352 objection to any of this evidence at trial, this argument still fails because such an objection would have been overruled. Evidence Code section 352 is designed for situations in which evidence of little evidentiary impact evokes an emotional bias. (*People v. Olguin, supra*, 31 Cal.App.4th at p. 1369.) Evidence related to gang activity or affiliation is admissible when relevant to show motive and intent, even when prejudicial. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 413.)

In this case, the expert testimony and general gang allegations were relevant to explain appellant's motive and intent for committing the crime. As explained above, the expert testimony rationalized to the jury an otherwise illogical act, thus giving it high probative value. Further, while information detailing appellant's gang affiliation was

prejudicial to a certain degree, the evidence was highly relevant to the prosecution's theory of conspiracy. Appellant's involvement and participation in a gang explains why appellant and other members of his gang would return to the park after the initial confrontation, armed and ready to kill. Assuming a proper objection was made at trial, the expert testimony and gang information carried enough probative weight for the trial judge to overrule the objection. Therefore, appellant's argument has no merit.

II. Substantial Evidence

Appellant next contends that there was insufficient evidence of a conspiracy to commit murder because the prosecution failed to prove there was an agreement to commit murder. Moreover, appellant argues, if there is insufficient evidence to support the conspiracy to commit murder count, then the first degree murder, attempted premeditated murder and attempted murder counts must also fail because these charges were predicated on the conspiracy count. However, there was sufficient evidence for the jury to conclude appellant was involved in a conspiracy to commit murder.

A. Review of the record reveals there was substantial evidence to support the conspiracy to commit murder count

The standard for evaluating a sufficiency of evidence argument on appeal is "review [of] the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) This standard also applies to a review of circumstantial evidence. (*People v. Bean* (1988) 46 Cal.3d 919, 932.) A finding of fact must be an inference drawn from evidence rather than mere speculation. (*People v. Tripp* (2007) 151 Cal.App.4th 951, 959.) Issues such as credibility are for the jury or judge as trier of fact to determine and impeachment

and inherent probability are normally matters to be determined in the trial court. (See *People v. Swanson* (1962) 204 Cal.App.2d 169, 172.) Thus, if the circumstances reasonably justify the jury's findings, a court may not reverse the judgment because the circumstances also support a contrary finding. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

To support the conspiracy count, the prosecution theorized that an agreement was formed after appellant approached Paul, Bobby, and Olvera in the park, and disrespected a member of the Ghetto Boys. This interaction was the prelude to an agreement for appellant and his cohorts to return later, armed and ready to kill members of the Ghetto Boys. In contrast, appellant claims that the prosecution elicited no facts to show an agreement to commit murder was formed between members of the Primera Flats. As support for this proposition, appellant points to the fact that there were no explicit threats of violence made during the initial interaction in the park. Instead, appellant argues that the prosecution concluded there was an agreement based on evidence of the conspirators' gang membership and the fact that the crime, allegedly the subject of the conspiracy, actually occurred.

We disagree. It is undisputed that appellant was part of the group that approached and spoke with the Martinez brothers and Olvera hours before the shooting. So is the fact that appellant challenged a member of the Ghetto Boys by calling him a "Gummy Bear" and telling him he was not welcome in the park. Bobby understood appellant's words to mean that appellant was attempting to incite violence among the gangs. Likewise, Paul believed appellant concealed a gun in his pocket. The jury also heard testimony from Paul, Mario, and Olvera that appellant was a present and active participant in the shooting that occurred at the same location -- a shooting that happened to target two Ghetto Boys gang members, including one member that had been warned to avoid the park hours earlier.

The jury could infer from this evidence that after appellant approached the group in the park, he and his cohorts forged an agreement to murder Paul because he was a

member of the Ghetto Boys. This agreement was a reasonable inference given the evidence presented at trial; one based on more than mere speculation. Thus, there was substantial evidence to conclude appellant and his co-conspirators formed a conspiracy to commit murder.

B. A finding of substantial evidence for the conspiracy to commit murder count supports the jury's verdict on the other counts

As explained above, there was substantial evidence to support the jury's verdict on the conspiracy to commit murder count. Thus, as appellant concedes, because there was substantial evidence to support the conspiracy to commit murder count, there was sufficient evidence to support the jury's verdict on the other counts.

III. Sentencing

In addition to the multiple indeterminate sentences, appellant was sentenced to a consecutive determinate term of nine years on count 2. Appellant contends that term violated his federal constitutional rights to a jury trial, proof beyond a reasonable doubt and due process as set forth in *Cunningham v. California* (2007) 549 U.S. 270 and other cases because the aggravating factors relied on by the court to impose the upper term were neither found true by the jury beyond a reasonable doubt nor admitted by appellant.

One of the factors relied upon by the trial court was appellant's "prior performance on probation was unsatisfactory." In *People v. Towne* (2008) 44 Cal.4th 63, 70, the California Supreme Court held, "the aggravating circumstance that a defendant's prior performance on probation or parole was unsatisfactory may be determined by a judge, so long as that determination is based upon the defendant's record of one or more prior convictions." Moreover, appellant was sentenced after California's sentencing law was judicially reformed to conform to the federal law. (*People v. Sandoval* (2007) 41 Cal.4th 825, 843-852, 857.)

Appellant asserts that *Towne* and *Sandoval* and other California Supreme Court cases addressing sentencing were badly reasoned and require reconsideration. We are bound by those decisions. (Cf. *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.